92-132

No. _____

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In The

Supreme Court of the United States

October Term, 1992

BRENDA JONES, Individually and As Administratrix of the Estate of EVAN A.M. JONES, Deceased,

Petitioner,

vs.

PETTY-RAY GEOPHYSICAL GEOSOURCE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FINDING THAT THERE WAS NO JURISDICTION OVER THE RESPONDENTS IN THIS CASE.

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BRENDA JONES, Individually and As Administratrix of the Estate of EVAN A.M. JONES, Deceased, Petitioners herein, by and through her appellate attorneys of record, CHARLES LOUIS ROBERTS and JAMES F. SCHERR, hereby petitions this Court to grant a Petition Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit in *Brenda Jones, Individually and As Administratix of the Estate of EVAN A.M. JONES, Deceased,* No. 90-2093 was entered on April 15, 1992. The Opinion of the panel in this case was rendered on February 28, 1992 and is reproduced here in as App. 1a.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on April 15, 1992. This Petition is timely filed within ninety (90) days of April 15, 1992, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This wrongful death action arose when a Texas citizen, EVAN JONES, was murdered by anti-government rebels in the Democratic Republic of the Sudan in April, 1984. Jones was employed by Petty-Ray Geophysical Geosource, Inc. (Geosource), a Texas Corporation, as an oil exploration engineer. Geosource was a subcontractor working for a general contractor, Total Compagnie Francais des Petroles (Total C.F.P.), at several different job sites in South Sudan. During their normal course of

serious operations, Geosource, Total C.F.P., and the Sudanese government all either discovered or should have discovered that anti-government forces in the Sudan had made serious threats against Americans working in the area. Despite this actual or constructive knowledge, the defendants failed to remove Jones from the area or warn him of the danger. These negligent failure to act were a proximate cause of Jones' death.

In order to understand fully the jurisdictional issues presented here, it is necessary to describe in some detail the structure of the relevant defendant, Total C.F.P. Total C.F.P. is organized into a number of different subsidiaries, all of which are, on paper, separate entities. Total C.F.P.'s operations in the Sudan are run by Total Soudan, a French corporation which does business only in the Sudan. Total C.F.P.'s oil exploration operations generally are run by Total Exploration, another French corporation, but it does much of its business through over 400 subsidiaries. Indeed, Total C.F.P. owns 50 percent or more of the stock in 11 separate American companies which have offices in Texas.

While Total C.F.P.'s many subsidiary corporations are separate in theory, they are not at all separate in practice. All are essentially run directly from Total C.F.P.'s main offices in France, pursuant to a single unified economic plan. Employees often work for more than one subsidiary, and the salaries of all subsidiary employees are paid not by the employing subsidiary, but by one of three nominally separate subsidiaries created by Total C.F.P. to handle its financial affairs. All the subsidiaries have

interlocking directorship as well as interlocking ownership, and Total C.F.P. prepares one single unified financial statement for all its operations. None of the subsidiaries involved here hold themselves out either to the public or to their subcontractors as being different from Total C.F.P. To the contrary, the subsidiaries all hold themselves out as an inseparable part of the "Total Group," and all therefore benefit substantially from Total C.F.P.'s reputation and goodwill.

Subsequent to the contract between Total Exploration and Geosource, representatives from Total came to the offices of Marathon Oil in Houston, Texas, to solicit a partner for a venture (which later resulted in Geosource being awarded the subcontract for the project) (R Document #208, Plaintiff Supplement to Motion to Grant Rehearing on Dismissal of Total Group for Lack of Jurisdiction, attached exhibits)[1]; (R Document #293, Plaintiff's Second Motion for Rehearing on Jurisdiction over total Group, attached exhibits)[2]; and (R Document #85, Plaintiff's Response to Defendants Total Explorations and Total Soudan's Motions for Dismissal, attached exhibit number 26)[3]. Marathon Oil became partners with Total by contract signed in Paris (R Document 208, Exhibits). The contract required Marathon to pay its pro rata share of

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[1] Reference to this record hereinafter (R Document #208, Exhibits)

[2] Reference to this record hereinafter (R Document #293, Exhibits)

[3] Reference to this record hereinafter (R Document #85, Exhibits)

past and future expenditures up to $15,980,000.00 in return for one-half (1/2) of Total's interest in the Project (R Document 85, Exhibit #26). Marathon Oil had numerous projects with Total, including projects in Brazil, Egypt, the United Kingdom and Kenya.

Total Exploration then sent an invitation to bid to Geosource and three other Texas based companies, from which bids Geosource was chosen (R Document #85, Exhibit 9). Geosource, a Texas based corporation entered into a contract with Total Exploration on July 15, 1981, prior to the death of EVAN JONES. The Contract required GEOSOURCE to do certain things from its Houston Office. Equipment was sent from Texas, including electronic equipment purchased specifically for this job (R Document #85, Exhibit 18). The Contract provided that recording instruments, geophones/cables, radios and automotive (buggy/Kenworth) would come from the U.S.A. In fact as part of the consideration for TOTAL hiring GEOSOURCE, GEOSOURCE bought equipment from TOTAL. GEOSOURCE, Houston paid TOTAL approximately $6,000,000.00 to buy equipment for the job (R Document #85, Exhibits 19, 20), including a large stock of KENWORTH trucks and 12 land rovers. According to the Contract, TOTAL was required to pay transportation costs of the equipment to Sudan and a demobilization cost for return of the equipment. (R Document #85, Exhibit 6, Art. VII B). According to the contract, TOTAL was to pay a lump sum amount to bring GEOSOURCE employees to Sudan and return them (R Document #85, Exhibit 6, Addendum VII A). Payment was to be made to Banks designated by GEOSOURCE calculated in U.S. Dollars. (R Document #85, Exhibit 6, Article 7). Article 5 of

the Contract placed a secrecy obligation on GEOSOURCE to not reveal information which, if course, could be enforced in Houston. There are thousands of cables and letters between GEOSOURCE and TOTAL which TOTAL refuses to produce (R Document #85, Exhibit 24). Upon development of information on this project, TOTAL instructed GEOSOURCE to deliver films to MARATHON OIL, Marathon Tower, 6555 San Felipe, Houston, Texas 77056. (R Document #85, Exhibit 28). TOTAL also instructed GEOSOURCE to deliver gravity tapes on this job to MARATHON OIL in Houston, Texas. (R Document #85, Exhibit 26, R Document 85, Exhibit 10). During the course of the project contracted for with Geosource, Total had daily contact in Houston with Marathon (R Document #293, Exhibits).

REASONS WHY THE WRIT SHOULD BE GRANTED

The Supreme Court of Texas in *Guardian Royal* has held that:

> General jurisdiction may be asserted when the cause of action does not arise from or relate to the nonresident defendant's purposeful conduct within the forum state but there are continuous and systematic contacts between the nonresident defendant and the forum state, *Helicopteros*, 466 U.S. at 414-16, 104 S.Ct. at 1872-73; *Scholobohm*, 784 S.W.2d at 357. When general jurisdiction is asserted, the minimum contacts analysis is more demanding and requires a showing of substantial activities in the forum state. *Scholobohm*, 784 S.W.2d at 357.

* * *

> When specific jurisdiction is asserted, the cause of action must arise out of or relate to the nonresident defendant's contact with the forum state in order to satisfy the minimum contacts requirements. *Helicopteros,* 466 U.S. at 414 n.8, 104 S.Ct. at 1872 n.8. *See World Wide Volkswagen,* 444 U.S. at 293-94, 100 S.Ct. at 565. However, the contact must have resulted from the nonresident defendant's purposeful conduct and not the unilateral activity of the plaintiff or others. *See Helicopteros,* 466 U.S. at 417, 104 S.Ct. at 1873; *World Wide Volkswagen,* 444 U.S. at 298 100 S.Ct. at 567-68. Furthermore, the nonresident defendant's activities must have been "purposefully directed" to the forum and the litigation must result from alleged injuries that "arise out of or relate to" those activities. *Burger King,* 471 U.S. at 472, 105 S.Ct. at 2182; *Zac Smith & Co.,* 734 S.W.2d at 663. When specific jurisdiction is asserted, the minimum contacts analysis focuses on the relationship among the defendant, the forum and the litigation. *Helicopteros,* 466 U.S. at 414, 104 S.Ct. at 1872; *Scholobohm,* 784 S.W.2d at 357.
>
> *Guardian Royal Exchange Assurance, Ltd., v. English China Clays, P.L.C. et al.,* 34 Sup.Ct.J. 376, 379 (1991)

In this case, the Petitioner demonstrates that the "TOTAL GROUP" or "TOTAL" as an entity has had and continues to have continuous and systematic contacts with the forum of the United States in general and Texas in particular. In this respect, the Petitioner would note that this is not a case wherein the Respondent/Defendants are

asserting that another state in the United States is a more appropriate forum, but instead this is a case where the Respondent/Defendants are asserting that jurisdiction of the matter is not present in Texas and the United States, and that jurisdiction can only be had over this matter in Sudan, France, etc. Secondly, the Petitioner would note that a threshold problem emerges which must be handled before the evaluation of TOTAL's contacts with the form. That question is raised by the Respondent's dogmatic assertions that "TOTAL" or the Defendants/Respondents TOTAL EXPLORATION, TOTAL SOUDAN, and TOTAL CFP may not be considered as a separate entity because they are wholly distinct and separate French corporations, *Respondent's Brief,* at pp. 30-36. The Petitioner argues that these companies are and must be considered as a single entity or parts of the same entity, etc.

"TOTAL" must be considered as the same entity: (1) because it is in effect the same entity "alter ego"; (2) because the various parts act in an "agency" relation to each other and in relation to the whole; and/or (3) because the various part or division act as conduits for each other and/or for the whole. The key evidence supporting this argument comes from (1) the sworn testimony of various representatives designated by the TOTAL Group itself to explain TOTAL and other knowledgeable officers, etc., and (2) from the sworn testimony of various representatives of GEOSOURCE, a Texas based GEOPHYSICAL COMPANY, and MARATHON OIL, a Texas based oil company. The patterns which emerges from this testimony establish convincingly that jurisdiction in the United States and in particular in the State of Texas is proper and is not a violation of the Due Process

Clause. The first pattern is the description of "TOTAL" and the "TOTAL GROUP" which becomes evident from the evidence. **FIRST,** we learn that the TOTAL GROUP itself or "GROUPE TOTAL" represents itself generally to the world as one entity. **SECOND,** we learn that in its relations with its main business partners, the "TOTAL GROUP" makes no effort to distinguish one of its subsidiaries from another even when important and lucrative legal rights are at stake. **THIRD,** we discover that massive "TOTAL GROUP" which files a single tax return, issues a single financial statement, issues a single corporate prospectus, and which "altogether" is the eleventh largest oil company in the world and the second or fourth largest corporation in FRANCE. **FOURTH,** we note the actual structure of the organization of the group where the common corporate functions are fragmented into a host of separate corporations who, for example, (1) may have the functions of negotiating contracts (Defendant/Respondent TOTAL EXPLORATION); (2) may have the function to conduct specific exploration projects (Defendant/Respondent TOTAL EXPLORATION SOUDAN, TOTAL CHINE, TOTAL KENYA, etc.); (3) may have the function of paying all of the employees of the other "TOTAL" companies, (TOTAL G, TOTAL GR, etc.); and (4) where there is persuasive overlapping of directors, officers, and employees, etc. **FIFTH,** we notice that the directors, officers, and employees of these "TOTAL" companies invariably overlap. **SIXTH,** the evidence is unmistakably clear that TOTAL CFP directs, manages, and coordinates the entire TOTAL Group.

The Petitioner believes that the United States Court of Appeals for the Fifth Circuit (hereinafter "Fifth

Circuit") opinion in this case is in error because it is based on an erroneous interpretation of *Barnstone v. Congregation Am Echad,* 574 F.2d 286 (5th Cir. 1978) and a misunderstanding of the critical facts involved in this case. In regard to *Barnstone,* the facts presented in the case presently before this Court were distinguishable for the following reasons: (1) In *Barnstone* "there is no indication in the records that any officer, agent, employee or representative of defendant has ever physically come to the State of Texas." *Id.* at 287. (2) it was the plaintiff Barnstone who traveled to defendant's State for the purpose of the negotiation of the parties' contract. Contrarily, TOTAL, by and through its agents, made numerous trips to Houston for purposes of soliciting bids on the Soudan project, met with representatives of defendant GEOSOURCE and required no procurement of material by the Texas based company. Dismissal of Plaintiff's suit for want of jurisdiction was predicated on the absence of "points of contact between it and plaintiff within the State of Texas," *Barnstone,* 574 F.2d at 288.

However, in the case presented before this Court, the points of contact between Defendant and the State of Texas are substantial both with regard to acquisition of materials for the project as well as the consummation of the project. These contacts are sufficient in nature as to comply with Vernon's Ann.Tex.Civ.St. Art. 2031b as to satisfy the minimum contacts test required by the due process clause of the 14th Amendment, and to preclude dismissal for want of jurisdiction. Specifically the Fifth Circuit held:

> Plaintiff predicates jurisdiction over Total Exploration on its contract with Geosource, under

which Jones was employed by Geosource at the time of his death. In contract case, this Court has consistently looked to the place of contractual performance to determine whether the making of a contract with a Texas resident is sufficiently purposeful to satisfy minimum contacts. *See Barnstone v. Congregation Am Echad,* 574 F.2d 286, 288 (5th Cir. 1978). With regard to performance under the contract between Total Exploration and Geosource, the only Texas activity that Plaintiff has shown is unilateral activity by Geosource. In particular, Plaintiff relies on the following as support that the contact sufficiently tied Total Exploration to Texas: (1) Geosource was required to purchase materials from Total Exploration and Total Exploration knew the funds would originate from Texas; (2) a portion of Geosource's performance occurred in Texas; i.e., employment of Texas residents, payment for equipment purchases, and arrangement for work schedules; and (3) Geosource was required to maintain insurance, which was foreseeably obtained in Texas. In *Barnstone,* we rejected similar conduct as a basis for personal jurisdiction over the nonresident defendant. There, a Texas-based architect was employed to design a synagogue in Maine. The architect claimed that because his work on drawings and models occurred in Texas, the contract for services tied the out-of-state defendant to Texas. We disagreed, holding that the architect's activities in Texas "would appear to constitute unilateral partial performance," which could not "satisfy the requirement of contact with the forum state." *Barnstone,* 574 F.2d at 289.

Jones v. Petty-Ray Geophysical Geosource, Inc. ___ F.2d ___ 2941, 2950 (5th Cir. Feb. 28, 1992)

However, the facts demonstrate anything but unilateral performance by Geosource in Texas. However, the evidence for TOTAL's own witness, MR. BEEK, demonstrates other. Mr. BEEK described the contract as requiring GEOSOURCE in **Houston** to buy vehicles from TOTAL as part of the contract:

> Q. I take it, then, that Geosource bought from Total the Kenworth trucks. Is that right?
>
> A. Yes, sir, large stock of Kenworth trucks.
>
> Q. When you say a large stock, approximately how many?
>
> MR. MUNZINGER: Object on the basis of relevance.
>
> A. About ten.
>
> Q. Do you know the total value of that job – that purchase?
>
> A. No, I cannot recollect that.
>
> Q. The approximate value?
>
> A. Half a million.
>
> Q. Were there other products that Total sold to Geosource for this job?
>
> MR. MUNZINGER: I object until the identity of Total is specified, if the witness knows.
>
> A. Yes, 12 Land Rovers were sold.
>
> Q. How much was that, approximate value?
>
> A. Approximate value, I would say 100,000.

Q. *That was part and parcel of this contract.*

Is that right?

A. *That is correct.*

BEEK DEPO at 70. [Emphasis supplied]
Filed of Record as Dkt. Doc #85, (RI 1648), PLAINTIFF'S EXHIBIT IN SUPPORT OF PLAINTIFFS RESPONSE TO DEFENDANTS MOTION FOR DISMISSAL. at p. 73, 74

Secondly, the contract itself specifies that certain equipment will be purchased and mobilized in the United States, GEOSOURCE contract. Third, during the period preceding the death of the deceased, GEOSOURCE was required by TOTAL to engage in activities in the forum state with TOTAL's new Texas-based partner, MARATHON OIL:

Q. Whereby Marathon Oil would pay its proportionate share up to $15,980,000 U.S. dollars. Is that correct?

A. Correct.

* * *

Q. What I mean and what I'm asking, was the geophysical work done by Geosource from the same area on this farmout agreement with Marathon?

A. Yes.

Q. Is that why the tapes of the – the gravity tapes at the end of the job of Geosource were sent at your instruction to Marathon International Oil Company in Houston, Texas?

A. Yes, it is because we are the operator on that project and part of our duty is to send to

> the co-interest owners the information that everybody has paid for.
>
> *CASTELLANI DEPO at 30-32.*
> *Filed of Record as Dkt. Doc #85, (ri1648).*
> *PLAINTIFF'S EXHIBIT IN SUPPORT OF PLAINTIFFS RESPONSE TO DEFENDANTS MOTION FOR DISMISSAL.*

Fourth, the Petitioner would contend that the very fact that TOTAL sought out and obtained a partner in the forum state for this specific Sudan venture satisfies minimum contacts in itself. (As previously noted, the MARATHON partnership/joint venture was promulgated and put in operation ***after*** the GEOSOURCE contract, ***but before*** the decedent's death). These million dollar bilateral performances between GEOSOURCE and TOTAL are hardly comparable to the zero bilateral performance found in *Barnstone*. The Fifth Circuit also held that:

> In addition to adhering to a contacts analysis focusing on the place of performance, this Court has also recognized that the place of contracting and the law governing the contract, while not necessarily determinative, are relevant factors for determining purposeful activity. *See Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir. 1980). Although a relatively small part of the negotiations on the Geosource contract were conducted via telexes between Texas and France, we believe that in itself is insufficient to be characterized as purposeful activity involving the benefits and protections of the forum state's laws. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 561 Cir. (1984). Moreover,

> the record reflects that the contract was negotiated primarily in the United Kingdom, and contained a choice of law clause requiring arbitration under English law. Thus, the circumstances surrounding the negotiations and formation of the contract indicate rather forcefully that Total Exploration did not purposefully direct its activities toward Texas. This is not a case in which a foreign corporation has reached out and created "continuing relationships and obligations with citizens of another state," *Burger King, supra,* 105 S.Ct. at 2182; rather, Total Exploration negotiated with Geosource's United Kingdom office for exploration working the Sudan, and the fact that Geosource has a Houston office is nothing more than a mere fortuity.
>
> *Jones v. Petty-Ray Geophysical Geosource, Inc.*, ___ F.2d ___, 2941, 2951 (5th Cir. Feb. 28, 1992)

The Fifth Circuit apparently misunderstood the actual process by which the contract between TOTAL and GEOSOURCE was negotiated and signed. First of all, and this goes back to TOTAL's contract with the forum state, most of the solicitation for the contract was in the forum of the United States and in particular in Texas. This solicitation clearly indicates a willingness to have significant contacts with the forum of the United States/Texas as well as an indication that TOTAL was willing to avail itself of the protection/obligation of that forum. In addition, it might be pointed out that the single point by which this Court held that federal jurisdiction was possible over this case, the addendumification agreement offered by TOTAL in favor of GEOSOURCE vis-a-vis suits brought by GEOSOURCE employees was another indication that TOTAL

knew and understood the obligation of dealing with a Texas company; knew that it was dealing with a Texas company; and knew its obligation to the Texas company and there is no question that TOTAL was dealing with a Texas company both in the negotiations, signing and performance of the contract.

The attempt by the Respondents in this Court to consider this a contract between TOTAL and GEOPHYSICAL United Kingdom office is refuted not only by the facts of the negotiations but by the contract itself. As previously mentioned, there is no contest that TOTAL solicited several Texas companies in Texas before picking GEOSOURCE, Deposition of Lucio V. Margherita, at pp. 7-12, *Filed of Record as Dkt. Doc #85 (RI 1648), PLAINTIFF'S EXHIBIT IN SUPPORT OF PLAINTIFFS RESPONSE TO DEFENDANTS MOTION FOR DISMISSAL.* Secondly, the only reasons that TOTAL submitted a bid to GEOSOURCE at its United Kingdom office was not an attempt by TOTAL to bypass the jurisdiction of the United States by simply because the United Kingdom office of GEOSOURCE was the only authorized body to take bids for work to be done in Africa and the Middle East.

In the words of Mr. Jones, Vice President and General Counsel of GEOSOURCE, the bids were submitted to the United Kingdom office because:

> Because – our U.K. office is the headquarters for – Africa and the Middle East. And all bids, proposals and operations are handled out of the U.K. Petty-Ray U. K. office.
>
> *JONES depo.* at p. 18

All testimony indicated that the legal matters and the contract were negotiated by JONES in **Houston** for GEOSOURCE and TOTAL operating out of Paris, France in the form of telexes, contract copies, revised contracts, etc., passing to and from those two points but only the technical matters were settled.

This Court's opinion says only the technical matters were negotiated by GEOSOURCE's United Kingdom office while the legal matters, obligations, and responsibilities over the contract were negotiated wholly from **Houston.** Mr. JONES testified explicitly that:

> [Mr. Scherr:]
>
> Q. So I take it, then, Mr. Jones, that basically, you, from the headquarters here in Houston, negotiated the final terms and the final draft that was signed into the contract dated July 16, 1981, of Total Exploration; is that correct?
>
> A. That's correct. Insofar as – the terms of that contract dealt with – legal matters.
>
> Q. Yeah.
>
> A. But not technical matters. That was all dealt with strictly from the U.K.
>
> *JONES Depo* at p. 24.

And, of course, it is the legal matters involved in the contract, specifically the obligations of TOTAL to provide safety and police protection for GEOSOURCE workers in the Sudan that brings us into this Court today. Even more significant, the contract itself indicates that TOTAL knew that it was making a contract with a Texas company based in Texas, etc., however, Mr. JONES, vice president and general counsel of GEOSOURCE testified:

[by Mr. Scherr:]

Q. And on the very first page of the agreement, it shows that the contract was entered into between Total Exploration, Soudan Branch, and Petty-Ray Geophysical Division, Geosource, Inc. whose – registered office is at 6909 Southwest Freeway, Houston, Texas, U.S.A. 77074; is that correct?

A. That's correct.

Q. So it showed, on the very front, very first page of the agreement, that Total Exploration knew they were entering into a contract with a Houston-based company; is that correct?

A. That's correct.

JONES Depo at p. 41.

As the contract itself reads:

THIS AGREEMENT FOR GEOPHYSICAL SERVICES is dated this 16th day of JULY, 1981,

BY AND BETWEEN:

TOTAL EXPLORATION (SUDAN BRANCH) registered in KHARTOUM (SUDAN) under the number OC/1684 (dated April 2, 1980) with its offices at P.O. BOX 2781 Khartoum (SUDAN) hereinafter referred to as COMPANY and represented by Mr. F. CASTELLANI,

of the one part,

AND:

PETTY-RAY GEOPHYSICAL DIVISION, GEOSOURCE, INC., a Delaware U.S.A., corporation whose registered office is at 6909 Southwest Freeway, Houston, Texas (U.S.A.) 77074 hereinafter referred to as the CONTRACTOR and

represented by its Vice President Mr. R. T. WHITTINGTON,

of the other part,

FOREIGN
AGREEMENT FOR GEOPHYSICAL SERVICES

TOTAL no 2890

PLAINTIFF'S EXHIBIT IN SUPPORT OF PLAINTIFFS RESPONSE TO DEFENDANTS MOTION FOR DISMISSAL.

IN WITNESS WHEREOF, the Parties hereof have executed this Agreement in multiple originals the day and year first above written.

CONTRACTOR:	COMPANY:
PETTY-RAY GEOPHYSICAL DIVISION,	TOTAL EXPLORATION (SUDAN BRANCH)
signed	*signed*
R.T. WHITTINGTON	F. CASTELLANI

PLAINTIFF'S EXHIBIT IN SUPPORT OF PLAINTIFFS RESPONSE TO DEFENDANTS MOTION FOR DISMISSAL.

Again, the Petitioner would bring out that it is the legal obligations of this contract by which TOTAL agreed to provide for the safety and protection of GEOSOURCE workers and agreed to addendumify GEOSOURCE for the damage of any suit brought by such workers would clearly indicate a willingness and realization on the part of TOTAL that it was obligated not only in the contract itself but in the forum of Texas.

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioner prays that this Court grant a Petition for Certiorari to the United States Supreme Court and thereafter reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Brenda JONES, Individually and as Administratrix of the Estate of Evan A.M. Jones, Deceased, Plaintiff-Appellant,

v.

PETTY-RAY GEOPHYSICAL, GEOSOURCE, INC., et al., Defendants.

Total Exploration, Total Soudan, and Total Compagnie Francais Des Petroles, Defendants-Appellees.

No. 90-2093.

United States Court of Appeals,
Fifth Circuit.

Feb. 28, 1992.

Appeals from the United States District Court for the Southern District of Texas.

Before GOLDBERG and GARWOOD, Circuit Judges.[1]

GARWOOD, Circuit Judge:

Plaintiff-appellant Brenda Jones (Plaintiff) originally filed this suit in a Texas state court against defendant-appellee Petty-Ray Geophysical Geosource (Geosource) seeking recovery for the death of Evan Jones (Jones). Geosource brought a third-party complaint against defendant-appellee Total Exploration, a French corporation, which then successfully removed the case to the federal

---

[1] Chief Judge Charles Clark was a member of the original panel but resigned from the Court on January 15, 1992, and therefore did not participate in this decision. This matter is being decided by a quorum. 28 U.S.C. § 46(d).

district court below and subsequently moved for dismissal based on lack of personal jurisdiction. The district court initially denied the motion to dismiss, but ultimately granted it after reconsideration. We affirm.

Facts and Proceedings Below

On January 21, 1986, Plaintiff, a Texas resident, brought this suit in Texas state court against Geosource, claiming that her husband, Jones, was murdered by anti-government rebels while he was employed by Geosource in the Democratic Republic of the Sudan in April 1984.[2] Plaintiff's cause of action was based on Geosource's negligent failure to warn of danger of which it was aware or should have been aware. Geosource filed a third-party complaint against Total Exploration, seeking contractual contribution and indemnity from Total Exploration, for whom Geosource was performing subcontracting work in the Sudan. On May 23, 1986, Total Exploration successfully removed the case to federal district court pursuant to 28 U.S.C. § 1441, alleging jurisdiction under 28 U.S.C. §§ 1880, 1882. Following removal, Plaintiff added as defendants to the suit Total Compagnie Francais des Petroles (Total CFP) and Total Soudan, also French corporations, and the Republic of Sudan and two corporate instrumentalities of Kuwait. Total Exploration and Total Soudan are wholly-owned subsidiaries of Total CFP, the

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[2] Total Exploration and others of the foreign defendants denied that Jones was murdered or that Plaintiff is his widow. Indeed, evidence in the record casts doubt on both propositions.

majority of whose stock is in turn owned by the government of France. All of the foreign defendants moved for dismissal based on lack of personal jurisdiction. On October 3, 1989, the district court entered separate orders dismissing the Republic of Sudan and the Kuwait corporate instrumentalities, but denied the motions to dismiss of Total Exploration, Total Soudan, and Total CFP (collectively, the Total entities). Upon reconsideration on October 27, 1989, however, the Total entities' motions were granted and all the Total entities were dismissed. The district court certified its order dismissing the Total entities as a final order pursuant to Fed.R.Civ.P. 54(b), and we review that dismissal order in the instant appeal.

Discussion

I. Subject Matter Jurisdiction

Plaintiff first seeks to have the dismissal below vacated and the case remanded to a Texas state court, parties intact, on the ground that federal subject matter jurisdiction is absent.

Initially, we note that Plaintiff failed to object below to Total Exploration's removal of the case from Texas state court to federal court, and never moved below to remand. Any defect in removal was therefore waived. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1546 (5th Cir. 1991) However, a waiver of defects in removal does not waive the fundamental requirement of original subject matter jurisdiction. *Id.* Rather, once the plaintiff has waived the right to contest removal, "[t]he jurisdictional issue on appeal becomes whether the federal district court would have had jurisdiction over the case had it

originally been filed in federal court." *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 546 (5th Cir. 1990); *see also Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972). Three possible bases for subject matter jurisdiction have been advanced by the Total entities.

A. Diversity of citizenship

Total Exploration removed the case in part based on 28 U.S.C. § 1332, which authorizes original jurisdiction between, *inter alia*, "citizens of a State, and foreign states or citizens or subjects thereof." 28 U.S.C. § 1332(a)(2). Plaintiff (administratrix of Jones' estate) challenges removal on this ground, pointing to 28 U.S.C. § 1332(c)(2), which provides that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same state as the decedent." Both parties agree that Jones was a British national; therefore, Plaintiff argues that she is an alien for diversity purposes, and thus diversity jurisdiction was destroyed by the presence of alien parties on both sides of the controversy. *See Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir.1975); *see also Field v. Volkswagenwerk A.G.*, 626 F.2d 293, 296 (3d Cir.1980). However, the provision on which Plaintiff relies was not effective until May 18, 1989, some three years after the suit was removed. Prior to the amendment, the rule in this Circuit was that "an administratrix's citizenship will govern the diversity inquiry" unless the administratrix was selected to manufacture diversity. *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d 392, 394 (5th Cir.1984). There are no grounds for

concluding that Plaintiff, a citizen of Texas, is trying to manufacture diversity; in fact, she argues against it.

Although Plaintiff may have relied on the wrong provision (a matter we do not ultimately decide) in asserting that diversity is incomplete, her assertion is nevertheless correct for another reason. In their diversity argument, the Total entities overlooked the fact that co-defendant *Geosource*, a Delaware corporation with its principal place of business in Texas, is a *Texas citizen* for diversity purposes 28 U.S.C. § 1332(c)(1). Because section 1332 grants federal subject matter jurisdiction only where diversity of the parties is complete,[3] *Getty Oil, Div. of Texaco v. Insurance Co. of North America*, 841 F.2d 1254, 1258 (5th Cir.1988), the presence of a Texas party on each side of the litigation removes diversity of citizenship as possible basis of subject matter jurisdiction in this case. *See also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 2221, 104 L.Ed.2d 893 (1989) (recognizing that 28 U.S.C. § 1332(a)(8) confers jurisdiction in federal district court when a citizen of one state sues both aliens and citizens of a state (or states) *different from the plaintiff's state*).

B. Foreign Sovereign Immunities Act

The Total entities also argue that jurisdiction was proper under the Foreign Sovereign Immunities Act

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[3] This complete diversity requirement is based on the diversity statute, not Article III of the Constitution. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 87 S.Ct. 1199, 1203-04, 18 L.Ed.2d 270 (1967).

(FSIA), 28 U.S.C. § 1602 *et seq.* and under 28 U.S.C. § 1330, which authorizes an exercise of subject matter jurisdiction over actions against foreign states. The Supreme Court has held that the FSIA grants jurisdiction to the federal courts over claims of foreign states to sovereign immunity, and, furthermore, provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country. *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 109 S.Ct. 683, 692, 102 L.Ed.2d 818 (1989). Thus, the purpose of the FSIA is dual: "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604 (1976).

None of the Total entities claims to be an arm or agency or instrumentality of the French government. *See* 28 U.S.C. § 1603(b). Accordingly, at the time of removal, when only Geosource and Total Exploration were defendants, jurisdiction was not proper under the FSIA. However, after removal Plaintiff added the Republic of Sudan and two corporate instrumentalities of Kuwait, parties within the scope of the FSIA. *See* 28 U.S.C. § 1603. The Total entities argue that, because Plaintiff waived defects in removal, jurisdiction under the FSIA can be sustained on the basis of the presence of the Republic of Sudan and the Kuwait instrumentalities. *See Kidd*, 891 F.2d at 546. Assuming, *arguendo only*, that this requirement for FSIA federal court jurisdiction is thus satisfied, we nevertheless conclude that FSIA federal court jurisdiction was lacking on another ground.

Whether subject matter jurisdiction may be premised on the FSIA turns on application of the Act's substantive provisions. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 1967 n. 5, 76 L.Ed.2d 81 (1983). Under section 1330(a), the jurisdictional statute corresponding to the FSIA, federal district courts are vested with subject matter jurisdiction if a foreign state is "not entitled to immunity either under sections 1605-1607 [of the FSIA] . . . or under any applicable international agreement." 28 U.S.C. § 1330(a). Conversely, if none of the exceptions to sovereign immunity set forth in the FSIA applies, the district court lacks statutory subject matter jurisdiction.[4] *Verlinden*, 103 S.Ct. at 1969; *see also Amerada Hess*, 109 S.Ct. at 692. Thus, where a case is removed based on the FSIA and section 1330, federal jurisdiction over both foreign *and nonforeign parties* does not attach until it is determined that the foreign sovereign lacks immunity pursuant to the FSIA.[5] *Security Pacific Nat'l Bank v. Derderian*, 872 F.2d 281, 283 (9th Cir. 1989); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372-73 (7th Cir.1985).

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[4] In such a case, the foreign state is also ensured immunity from the jurisdiction of state courts by section 1604. *Verlinden*, 103 S.Ct. at 1969.

[5] In this regard, we note that our posture in this case is somewhat unusual because the foreign sovereigns are not before this Court, yet we determine their entitlement to immunity under the FSIA in deciding that the district court was not vested with subject matter jurisdiction under the FSIA. *See Verlinden*, 103 S.Ct. at 1971 n. 20 (concluding that even if the foreign state does not enter an appearance, a district court must still determine, as a prerequisite to exercising jurisdiction, whether immunity is unavailable under the FSIA).

Under the FSIA, exceptions to immunity include any action

> "not otherwise encompassed in paragraph (2) above [commercial activities], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . . " 28 U.S.C. § 1605(a)(5) (emphasis added).

This exception requires not only that personal injury or property damage occur in the United States, but also that the tortious act or omission occur here. *Amerada Hess*, 109 S.Ct. at 690-91. Our analysis is therefore governed by the fact that Jones' alleged murder, and his death, occurred in the Sudan. Because none of the other exceptions encompassed within the FSIA is applicable,[6] we hold that jurisdiction cannot be premised on the FSIA in this case.

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[6] The other exceptions are (1) waiver of immunity by the foreign state; (2) actions based on the commercial activities by a foreign state carried on in the United States or that have a direct effect in the United States; (3) a taking in violation of international law; (4) succession to property in the United States; and (6) maritime liens based upon a commercial activity of the foreign state. 28 U.S.C. § 1605(a). Of these additional exceptions, only section 1605(a)(2) (commercial activities) might conceivably apply; however, like section 1605(a)(5), this provision encompasses only injuries or acts within the United

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C. *Third-party claim*

Finally, the Total entities argue that the case was removable based on Geosource's third-party claim against Total Exploration for contractual indemnity. *See In re Wilson Industries, Inc.*, 886 F.2d 93, 96 (5th Cir.1989) (recognizing that removal of an entire action can be based on a third-party claim where a separate and independent controversy is stated). 28 U.S.C. § 1441(c), as in effect when this suit was filed and removed, and when the complained of dismissal was entered, provided:[7]

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States. Here, Jones died in the Sudan, and there is no allegation that the foreign sovereigns acted within the United States to cause his death. *Cf. Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 419 (5th Cir.1987) (holding that the eventual effect in the United States of the personal injury or death of an American citizen while abroad is not direct within the meaning of the FSIA even if the foreign government might foresee that a United States citizen might be injured while travelling or working in the territory), *cert. denied*, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 862 (1988). Accordingly, we conclude that none of these exceptions to foreign sovereign immunity applies in this case.

[7] As presently in effect, section 1441(c) provides:

> "Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates."

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

Because Geosource and Total Exploration are diverse, federal jurisdiction would be proper over Geosource's claim for indemnity if brought alone. *See* 28 U.S.C. § 1332(a)(2). Our focus shifts, then, to whether Geosource's claim against Total Exploration represents a separate and independent cause of action.

This Court has held that where the third-party complaint seeks indemnity based on a separate obligation owed to the defendant (such as a contractual indemnity obligation), there is a separate and independent claim. *Carl Heck Engineers v. Lafourche Parish Police Jury*, 622 F.2d 133, 136 (5th Cir.1980). The record discloses that Geosource sought indemnity from Total Exploration based on the contract between them.[8] Therefore, following the

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[8] The agreement for geophysical services between Total Exploration (the "Company") and Geosource (the "Contractor") provided in part that:

> "COMPANY shall protect, indemnify, defend and save CONTRACTOR, its officers and directors, harmless from and against all claims, liabilities, demands, causes of action and judgments . . . arising

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teachings of *Carl Heck Engineers*, we conclude that the present action was properly removed to federal district court pursuant to former section 1441(c), and the district court then properly exercised subject matter jurisdiction over this entire litigation.

Finally, we note our holding in *Walker v. Savell*, 335 F.2d 586-89 (5th Cir.1964), where we sustained the trial court's authority to grant a motion to quash service of process before hearing a pending motion to remand. *See also Nolan v. Boeing Co.*, 736 F.Supp. 120, 122 (E.D.La.1990).

II. Personal Jurisdiction

A.

In the determination of whether a foreign corporation should be required to defend itself in a suit in Texas arising out of a contract between it and a Texas corporation, each case must be decided on its own facts. *Southwest Offset, Inc. v. Hudco Pub. Co.*, 622 F.2d 149, 151 (5th Cir.1980). The facts giving rise to the instant litigation take us back to November, 1980, when the Republic of Sudan, Public Petroleum Corporation, International Energy Development Corporation (IEDC, a Swiss corporation), and Total Exploration (Sudan branch) entered

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in favor of or asserted by COMPANY, its subcontractors (other than CONTRACTOR) or the employees of either on account of damage to the property of COMPANY, its subcontractors (other than CONTRACTOR) or the employees of either."

into a petroleum sharing contract, which contemplated joint exploration for hydrocarbon substances in southern Sudan. Total Exploration, which had a sixty-five percent share in the venture, invited Geosource (via telex to Geosource's United Kingdom office, the location of Geosource's headquarters for its operations in Africa and the Middle East) to bid as a subcontractor on the project. Other companies were also solicited to bid, but only Geosource responded. Although technical details of the contract were worked out by telephone and telex mainly between Geosource's United Kingdom office and Total Exploration's offices in Paris and Khartoum, several communications originated from Geosource's legal department in Houston, Texas. No face-to-face negotiations were conducted in Texas (or the United States, for that matter).

The contract between Total Exploration and Geosource was signed on July 16, 1981, in the United Kingdom. Included within the provisions of the final contract were requirements that Geosource provide equipment and personnel to perform the contract. The place of origin of such materials was not specified. The contract also contained choice of law and arbitration clauses, which dictated that all questions arising under the contract were to be resolved in London through binding arbitration in accordance with the rules of the International Chamber of Commerce, with English law supplying the rule of decision.

All material performance by Geosource under the contract, which consisted of seismic exploratory operations, occurred in the Sudan. All data processing work was performed in the United Kingdom, and final written

reports were sent to Total Exploration in Khartoum. Compensation from Total Exploration to Geosource was chiefly effected through Morgan Guaranty Bank in London.

Total Exploration is a French corporation engaged in the exploration and production of petroleum. It is based in France. It has never done or been licensed to do business in Texas, nor does it own property of any type or have any employees in Texas. On April 1, 1983, Total Exploration's interest in the contract was assigned to Total Soudan.

Total Soudan is also incorporated in France. Its business activities have been conducted exclusively in the Sudan. It does no business in Texas, nor is it qualified to do so, and it has no property or employees there.

Total CFP is a French corporation. It is the parent company over all the world-wide Total Group operations and subsidiaries. No subsidiary of Total CFP is incorporated in Texas. Total CFP is not qualified to do business in Texas; moreover, the record reflects that it does not do any business directly in Texas or have any employees or property there.

B.

Two preconditions generally must be satisfied to allow personal jurisdiction over nonresident defendants served out of state: (1) the nonresident must be amenable to service of process under the forum state's long-arm statute (an issue that is governed by the law of the forum state); and (2) if the state jurisdictional test is met, the

assertion of jurisdiction over the non-residents must be consistent with the Fourteenth Amendment due process clause. *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1265 (5th Cir.1988). The burden of establishing the district court's personal jurisdiction over the Total entities in this case rests on Plaintiff. *D.J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 545 (5th Cir. 1985). However, only a *prima facie* case must be established; proof by a preponderance is not required. *Id.* at 545-46. Any genuine, material confiicts between the facts as established by the respective parties' appropriate affidavits, and other proper summary judgment type evidence, must be resolved in Plaintiff's favor. *Id.*

The Texas long-arm statute authorizes the exercise of jurisdiction over, *inter alia*, those who do business in Texas, which includes contracting with a Texas resident where either party is to perform the contract in whole or in part in Texas. Tex.Civ.Prac. & Rem.Code § 17.042 (Vernon 1986) (replacing Vernon's annotated civil statutes article 2031b). Because the Texas long arm statute has been interpreted to extend to the limits of due process, *see Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990),[9] the

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[9] To ensure compliance with due process, the Texas Supreme Court has devised a jurisdictional formula, which it recently clarified in *Guardian Royal Exchange Assurance Ltd. v. English China Clays, PLC*, 815 S.W.2d 223, 230 (Tex. 1991):

> "[T]he nonresident defendant must have purposefully established 'minimum contacts' with Texas. There must be a 'substantial connection' between the nonresident defendant and Texas arising from action or conduct of the nonresident

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principal question here is whether the assertion of jurisdiction over the Total entities by the district court is constitutionally permissible. *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 n. 15 (5th Cir.1988).

Under the federal constitutional test of due process, the plaintiff must overcome two hurdles to justify the exercise of jurisdiction over a nonresident defendant. The first prong of the analysis is the "minimum contracts" test, under which the plaintiff must establish that the defendant "purposefully avai![ed]" itself of the privilege of conducting activities in the forum, "thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). Those activities, whether direct acts in the forum or conduct outside the forum, must justify a conclusion that the defendant should reasonably anticipate being called into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). The minimum contacts analysis has been further refined by the Supreme Court into specific and general jurisdiction. Where the defendant's activities in the forum are isolated or disjointed, jurisdiction is proper only if the cause of

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defendant purposefully directed toward Texas. When specific jurisdiction is asserted, the cause of action must arise out of or relate to the nonresident defendant's contacts with Texas. When general jurisdiction is alleged, there must be continuous and systematic contacts between the nonresident defendant and Texas. General jurisdiction requires a showing of substantial activities by the nonresident defendant in Texas." (footnotes omitted).

action arises from a particular activity. *Helicoperos Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 1872 & n. 8, 80 L.Ed.2d 404 (1984). On the other hand, where the defendant's forum activities are continuing and systematic, jurisdiction may be proper without a relationship between a defendant's particular act and cause of action. *Id.* 104 S.Ct. at 1872 & n. 9. The minimum contacts inquiry is broader and more demanding when general jurisdiction is alleged, requiring a showing of substantial activities in the forum state.

The second prong of the federal due process test requires a showing that the exercise of personal jurisdiction over the nonresident comports with fair play and substantial justice. *International Shoe Co. v. Washington*, 826 U.S. 310, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). In this inquiry, it is incumbent on the defendant to present at compelling case that the presence of some consideration would render jurisdiction unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 2184-85, 85 L.Ed.2d 528 (1985).

C.

Plaintiff predicates jurisdiction over Total Exploration on its contract with Geosource, under which Jones was employed by Geosource at the time of his death. In contract cases, this Court has consistently looked to the place of contractual performance to determine whether the making of a contract with a Texas resident is sufficiently purposeful to satisfy minimum contacts. *See Barnstone v. Congregation Am Echad*, 574 F.2d 286, 288 (5th Cir.1978). With regard to performance under the contract

between Total Exploration and Geosource, the only Texas activity that Plaintiff has shown is unilateral activity by Geosource. In particular, Plaintiff relies on the following as support that the contract sufficiently tied Total Exploration to Texas: (1) Geosource was required to purchase materials from Total Exploration, and Total Exploration knew the funds would originate from Texas; (2) a portion of Geosource's performance occurred in Texas; i.e., employment of Texas residents, payment for equipment purchases, and arrangement of work schedules; and (3) Geosource was required to maintain insurance, which was foreseeably obtained in Texas.[10] In *Barnstone*, we rejected similar conduct as a basis for personal jurisdiction over the nonresident defendant. There, a Texas-based architect was employed to design a synagogue in Maine. The architect claimed that because his work on drawings and models occurred in Texas, the contract for services tied the out-of-state defendant to Texas. We disagreed, holding that the architect's activities in Texas "would appear to constitute unilateral partial performance," which could not "satisfy the requirement of contact with the forum state." *Barnstone*, 574 F.2d at 289.

In addition to adhering to a contacts analysis focusing on the place of performance, this Court has also recognized that the place of contracting and the law governing the contract, while not necessarily determinative, are relevant factors for determining purposeful activity. *See Southwest Offset, Inc. v. Hudco Publishing Co.*,

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[10] The Total entities dispute several of Plaintiff's factual contentions. However, we need not resolve these factual disputes.

622 F.2d 149, 152 (5th Cir.1980). Although a relatively small part of the negotiations on the Geosource contract were conducted via telexes between Texas and France, we believe that in itself is insufficient to be characterized as purposeful activity invoking the benefits and protections of the forum state's laws. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir.1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 561 (1984). Moreover, the record reflects that the contract was negotiated primarily in the United Kingdom, and contained a choice of law clause requiring arbitration under English law. Thus, the circumstances surrounding the negotiation and formation of the contract indicate rather forcefully that Total Exploration did not purposefully direct its activities toward Texas. This is not a case in which a foreign corporation has reached out and created "continuing relationships and obligations with citizens of another state," *Burger King, supra*, 105 S.Ct. at 2182; rather, Total Exploration negotiated with Geosource's United Kingdom office for exploration work in the Sudan, and the fact that Geosource has a Houston office is nothing more than a mere fortuity.

D.

We believe that Plaintiff has failed to make a prima facie showing that Total Exploration availed itself of the privilege of conducting business in Texas or of the benefits and protections of Texas law even under the narrow specific jurisdiction standard.[11] Moreover, even were we

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[11] Because we conclude that minimum contacts are lacking, we do not resolve the issue of whether Plaintiff's cause of action for wrongful death arose out of the contract between Total Exploration and Geosource.

to impute Total Exploration's Texas contacts to Total CFP and Total Soudan, and vice versa, we would still conclude that Plaintiff has failed to demonstrate the requisite minimum contacts on behalf of any of the Total entities.[12]

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[12] As evidence of minimum contacts on behalf of Total CFP, Plaintiff alleges that Total CFP is a majority stockholder in eleven corporations with offices in Texas. However, we do not believe that mere stock ownership in Texas businesses reflects an activity "purposefully direct[ed]" toward Texas. As for imputing contacts of the subsidiaries to Total CFP, we have previously recognized that even ownership of 100% of the stock of a subsidiary is alone insufficient to fuse the subsidiary into the parent for purposes of establishing minimum contacts. *See Walker v. Newgent*, 583 F.2d 163, 167 (5th Cir.1978), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1994, 60 L.Ed.2d 374 (1979). *See also Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 774 n. 18 (5th Cir.1988). With regard to Total Soudan, Plaintiff points to the purchase of equipment from a Texas firm. We believe such activity does not satisfy the minimum contacts test. *See Hall, supra*, 104 S.Ct. at 1874 (holding that the mere purchase of goods is not enough to support jurisdiction where the claims do not arise out of such purchases). Plaintiff also points to Total Soudan's dealings with Marathon Oil (which Plaintiff *claims* is a Texas firm). Not only were these dealings wholly unrelated to Jones' death, but the venture centered on activities not in Texas, but overseas.

Plaintiff alleges no other contacts in Texas on behalf of the Total entities, other than attempting to attribute contacts of the entities to each other under an agency or alter ego theory. We do not address the validity of Plaintiff's arguments for imputing the contacts of each Total entity to the others because we find, even considering the Texas contacts of these three entities *en masse*, that such contacts do not withstand constitutional scrutiny.

Further, even if Plaintiff could establish minimum contacts, we believe it would be unreasonable to find personal jurisdiction over the Total entities here. *See Reich v. Signal Oil & Gas Co.*, 409 F.Supp. 846, 851 (S.D.Tex.1974) (recognizing that Texas has no "special" interest in granting relief to its citizens against a foreign corporation on a cause of action that arose under the laws of a foreign government for conduct outside the United States), *aff'd mem.*, 530 F.2d 974 (5th Cir. 1976).

Conclusion

For the reasons stated, the judgment of the district court dismissing Plaintiff's claims against Total CFP, Total Exploration, and Total Soudan for lack of personal jurisdiction is

AFFIRMED.

Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

No. 92-0132

In The

Supreme Court of the United States

October Term, 1992

BRENDA JONES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF EVAN A.M. JONES, DECEASED,

Petitioner,

v.

PETTY-RAY GEOPHYSICAL GEOSOURCE, INC., et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1.

May a federal court in Texas sitting in diversity exercise jurisdiction over three related French corporations in a suit for the alleged wrongful death in Sudan of a British citizen whose Texas employer contracted with one of the French corporations where the contract was not related to his alleged death?

LIST OF PARTIES

As required by Supreme Court Rule 24.1(b), the following is a list of persons who were parties to the proceeding below in the United States Court of Appeals for the Fifth Circuit.

1. Petitioner Brenda Jones, Individually and as Administratrix of the Estate of Evan A.M. Jones, Deceased.
2. Respondent Total Exploration.
3. Respondent Total Soudan.
4. Respondent Total Compagnie Francaise des Petroles.

Since the trial court's order, Total Compagnie Francaise des Petroles has changed its name to "TOTAL." Neither Total Exploration nor Total Soudan, which are subsidiaries of TOTAL, own any other subsidiary corporations. As required by Supreme Court Rule 29.1, the following is a list of TOTAL's subsidiary corporations which are not wholly owned:

1. Cofidep S.A.
2. Societe Financiere D'Auteuil.
3. Total Raffinage Distribution S.A.
4. La Seigneurie SA.
5. Cray Valley SA.
6. Societe Industrielle et Financiere de Lens.
7. Total Mauritius Limited.
8. Total Exploration Production Cameroun.

LIST OF PARTIES

9. Omnium Insurance and Reinsurance Company.
10. Distrol S.A.L.
11. Bostik S.A.
12. Total Austria Gmbh.
13. Total Hearing.
14. Total Nigeria PLC.
15. Total Raffinaderij Nederalnd NV.
16. Borsele Hydrocracker BV.
17. Total Hungaria Kereskedelmi KFT.
18. Total Canada Oil & Gas Ltd.
19. Total Petroleum (North America) Ltd.
20. Societe Fonciere et Commerciale des Petroles.
21. Total Turkiye Anonim Sirketi.
22. Total Energy Resources (Hong Kong) Ltd.
23. Total Energy Services (Hong Kong) Ltd.
24. Total Hutchison Energy Limited.
25. Compagnie Franco Tunisienne des Petroles.
26. Dubai Marine Areas Ltd.
27. Total and Partners Corp.
28. Total Saudi Corp.

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STATEMENT OF THE CASE

As a result of petitioner's failure to supply the Court with a "concise" statement of those "facts material to the consideration of the question presented," Sup. Ct. R. 14.1(g), her failure to provide appropriate record references to those facts, and her gross misstatement of the record, respondents are compelled to restate the case. *Id.* 15.1.

1. Proceedings in the Courts Below

This state law wrongful death action was initially commenced by petitioner Brenda Jones in the 157th District Court of Harris County, Texas, as a result of the alleged death[1], in the Sudan, of her decedent, Evan A.M. Jones, a subject of the United Kingdom who worked abroad but claimed his residence in Scotland (Welborn Exh. 22; Beck 31; Jones Exh. 8).[2] The action was removed

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[1] Petitioner has never provided admissible evidence proving Evan Jones' death nor have any of the defendants below admitted, indeed they have vigorously contested, her claim to have been his wife. The trial court specifically stated that its orders reciting his death and her widowhood were not findings of fact or conclusions of law. (Tr. 38-41)

[2] In what is perhaps the most egregious of her many misstatements, petitioner incorrectly states that her decedent, Evan A.M. Jones, was "a Texas citizen" (Pet. at 2).

References to a name followed by a number refer to the named witness' deposition and the page cited. Reference to a name followed by "Exh." refers to the numbered exhibit accompanying that witness' deposition. References to "Dkt. No." are to the pleading or other matter bearing that docket entry number as recorded by the district clerk in the record of docket

to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. §§ 1330, 1332, and 1441 by respondent Total Exploration ("Exploration"), a French corporation. Two other French corporations, respondents Total Soudan ("Soudan"), a sister corporation of Exploration, and Total Compagnie Francaise des Petroles ("Total CFP"), the corporate parent of Exploration and Soudan, were later joined as defendants.[3] The three Total entities were sued and joined as parties separately and at different times. Jones' petition intentionally treats them as if they are one, almost always referring to "Total" rather than a specific party, causing unnecessary confusion and outright distortion of the record. Since the issue of corporate identity and separateness is involved, the correct corporate identity is most important. The district court dismissed respondents from the action for lack of personal jurisdiction (Dkt. No. 189). On petitioner's motion, the district court's order was later certified as final (Dkt. No. 278). Fed. R. Civ. P. 54(b). On appeal from this final judgment, 28 U.S.C. § 1291, the United States Court of Appeals for the Fifth Circuit affirmed. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061 (5th Cir. 1992).

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entries. References to "Pet." are to the petition for writ of certiorari.

[3] Other defendants joined in the district court included the Republic of Sudan; Geosource, Inc. sued as Petty-Ray Geophysical Geosource; two instrumentalities of the Kingdom of Kuwait, International Energy Development Corporation (Sudan), Ltd. ("IEDC"), a Swiss corporation, and its corporate parent, Kuwait Foreign Petroleum Exploration Company, a Kuwaiti corporation, and; Marathon Petroleum Sudan, Ltd.

2. Statement of Facts

Exploration's Contract with Geosource

In November 1980, the Republic of Sudan, Public Petroleum Corporation, IEDC, and Exploration entered into a Production Sharing Contract contemplating the exploration for hydrocarbon substances in southern Sudan (Dkt. No. 118, Exh. E). Thereafter, Exploration invited several seismic contractors to bid as subcontractors on the exploration project (Jones 17; Margherita Exh. 1). One such contractor was Geosource, Inc., a Delaware corporation headquartered in Houston, Texas. The invitation to bid, however, was sent by telex from Exploration's office in Khartoum, Sudan to Geosource's office in the United Kingdom (Jones 18; Margherita 63 & Exh. 1).[4]

Although Geosource's legal department in Houston sent several communications to Exploration in Paris to finalize the terms of the agreement (Jones Exhs. 2, 5-7 & 14), all substantive and technical negotiations pertaining to the contract were conducted through and handled by Geosource's British office (Jones 23, 24, 27 and 28). Negotiations were conducted by telephone and telex between

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[4] Petitioner's statement that "most of the solicitation for the contract" occurred in Texas is simply wrong (Pet. at 15). Similarly, she is incorrect when she states that "TOTAL, by and through its agents made numerous trips to Houston for the purposes of soliciting bids on the Soudan [sic] project" (Pet. at 10). As explained below, no one from Exploration traveled to Texas to either solicit bids or negotiate the final contract between Exploration and Geosource. Furthermore, although other companies were invited to bid on the project, only Geosource responded (Margherita 22).

Geosource's office in the United Kingdom and Exploration's office in Paris and Khartoum (Jones 23-25; Margherita Exh. 4). No personnel from Exploration ever came to Texas during the course of negotiations. (Jones 82). Rather, all face-to-face negotiations occurred in Khartoum, Paris, London, and Venice (Jones 23; Margherita 62). All of the schedules to the contract were prepared in Geosource's U.K. office (Jones 28, 34). On July 16, 1981, the parties' agreement was executed in the United Kingdom (Jones 24, 27-28, 32-34, 37-39). Mr. Castellani, who executed the agreement for Exploration, did not even know Geosource had a Houston office; he dealt with Geosource U.K. (Castellani 17, 19).

Consistent with its understanding, Geosource was employed as an independent contractor (Jones 16-17 & Exh. 16). Under the contract, Geosource agreed to conduct geophysical surveys and acquire seismic data in southern Sudan and provide that data and data processing services to Exploration (Jones 16-17 & Exh. 16).[5] The contract contained choice of law, forum selection, and arbitration clauses, whereby all questions arising under the contract were to be resolved in London through binding arbitration in accordance with the rules of the International Chamber of Commerce with English law supplying the rule of decision (Jones Exh. 16).

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[5] Consistent with other factual misstatements in her petition, petitioner incorrectly states that Geosource acted as a subcontractor for Total CFP (Pet. at 2); the contract, however, was executed by Exploration in its own corporate name (Jones Exh. 16).

Since negotiations were with Geosource's U.K. office, no one connected with Exploration contemplated that Geosource's Houston office would be responsible for making arrangements to provide equipment or personnel to perform the contract (Jones 45-46; Margherita 32). Mr. Margherita, who negotiated the agreement for Exploration, was not aware that Geosource's Houston office would have any responsibility for administering or performing the agreement (Margherita 32). The contract, for example, called for Exploration to forward all required notices to Geosource's U.K. office; Geosource, in turn, was to send all notices to Exploration's office in Khartoum (Jones Exh. 16).

No aspect of Geosource's performance of the contract occurred in Texas or anywhere else in the United States, nor did the contract call for or contemplate performance in Texas (Jones Exh. 16). Obviously, the seismic work itself was to be performed in Sudan. All of Geosource's data processing work was done in the United Kingdom, and all written reports reflecting the seismic work were prepared by Geosource's U.K. office and sent to Exploration in Khartoum (Jones 63-64). All of Geosource's invoices were likewise prepared at and sent from its U.K. office, and all payments made by Exploration to Geosource in United States dollars were made to Morgan Guaranty Bank in London (Jones 63). To the extent Exploration paid Geosource in Sudanese pounds, payment was made in Khartoum (Jones 62-63). No payments were made through or to any bank in Texas (Jones 63).

Exploration's Assignment to Soudan and Soudan's Farm-Out Agreement With Marathon

Effective April 1, 1983, Exploration assigned its interest under the production sharing agreement to Soudan (Pommier Exh. 5). Notice of the assignment was sent to Geosource in Khartoum (Pommier Exh. 5). Soudan subsequently entered into a "farm-out" agreement with Marathon Petroleum Sudan, Ltd., a Delaware corporation having its principal place of business in Ohio, not Texas (Castellani Exh. 5). In negotiating the agreement, moreover, Soudan understood that it was dealing with an Ohio company (Castellani 29).

Prior to entering into the farm-out agreement, two "Total" representatives made a basic "farm-in" presentation to Marathon in Houston to acquaint it with the project in Sudan; no negotiations, however, took place in the Houston meeting, which lasted a "couple of hours" (Gerard 17). Instead, all negotiations and the final execution of the agreement occurred at "Total's office" in Paris (Gerard 25-28, 33-34). This contract, moreover, contained a choice of law clause specifying that English law would govern all disputes arising in connection with the agreement, and provided for binding arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Geneva, Switzerland (Castellani Exh. 5; Gerard Exh. 1). In any event, no part of this agreement was performable in Texas or related to the alleged death of Evan Jones in Sudan (Castellani Exh. 5).[6]

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[6] As petitioner points out, Soudan directed Geosource to send certain seismic tapes to Marathon at a Marathon office in

Exploration's Contacts With Texas

Exploration has never been licensed to do business in Texas, nor has it ever sought such licensure (Pommier 84). Exploration owns no property, real or personal, having its situs in Texas (Pommier 84-85). It has never prospected or searched for oil, other hydrocarbons, or any substance in Texas (Pommier 84); nor has it ever rented or leased any property in the state, or paid any tax to the State of Texas or any of its political subdivisions (Pommier 84-85). It has never sold any product in Texas, nor has it ever advertised or authorized any person to advertise on its behalf in Texas (Pommier 88). Exploration has never had any banking or financial arrangements with any Texas banks (Pommier 68, 70-71). It has never employed any Texas resident at any time on any project anywhere (Pommier 69-70).

Although Exploration has had other contractual relations with certain companies which have offices in Texas, each of those relationships involved work on projects outside the United States, and none of these contractual relationships were related to Exploration's work in Sudan pursuant to its contract with Geosource (Pommier 30-39 & Exh. 8). For example, Exploration contracted with International Shipping Co. to perform drilling work in the Mediterranean, and with Triton Oil & Gas to do research in France (Pommier 30 & Exhs. 8, 18-19). Exploration has also been a co-interest owner in foreign drilling contracts with Terra Resources in Columbia

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Houston (Pet. at 13). These instructions, however, were sent to Geosource in Khartoum, not Houston (Pommier Exh. 28).

(Pommier 31 & Exh. 8), Sedco Offshore, Inc. off of the Ivory Coast (Pommier 32 & Exh. 8), and Pecten Equatorial Guinea Co. in Equatorial Guinea (Pommier 34-36 & Exhs. 8 & 9). For these and other projects outside the United States, Exploration has ordered equipment and supplies which were shipped from Houston (Pommier 40-51 & Exhs. 10-18). None of these transactions, however, were in any way related to Exploration's contract with Geosource or the alleged death of petitioner's decedent in Sudan (Pommier 43).[7]

Soudan's Contacts With Texas

Like Exploration, Soudan has never had nor sought permission to do business in the State of Texas (Castellani 76). Soudan has never owned property, whether real or personal, in Texas; has never leased or rented property in Texas; has never maintained a telephone listing or an office facility in Texas; has never prospected for hydrocarbons or other substances in Texas; has never had any banking relationship with any financial institution in Texas; has never paid any taxes to the State of Texas or any political subdivision of the state; and has never employed any Texas resident (Castellani 74-75). As petitioner concedes, Soudan "does business only in the Sudan" (Pet. at 3).

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[7] Nothing of record establishes where any of these companies were incorporated or where Exploration's agreements with them were negotiated or executed.

Soudan has purchased certain equipment from two firms having offices in Houston, Texas. All of the equipment purchased from these two companies, however, was shipped to the Sudan (Castellani Exhs. 6-8, 10-11, 13-15). Soudan's contacts with both companies consisted of nothing more than remitting payment to Texas banks.[8]

Total CFP's Contacts With Texas and Relation to its Subsidiaries

The record reflects that Total CFP, like Exploration and Soudan, does not have an office in Texas (Sirven 53). Total CFP, moreover, has never contracted with any Texas resident, or bought or leased any property situated in Texas (Sirven 28). Total CFP owns more than 50% of the stock in eleven American companies that have offices in Texas; none of these subsidiaries, however, are incorporated in Texas (Sirven 9). Two of these subsidiaries, Total Energy Resources, Inc. and Total American, Inc., are holding companies. Total CFP owns 100% of Total Energy Resources, which owns 100% of Total American, which owns Total Minerals Corp. and Total Minatome Corp. (Sirven 11, 12). Only Total Minerals, which is engaged in uranium exploration and production in Texas, and Total Minatome, which is engaged in both on- and off-shore drilling activities in and near Texas and Louisiana, actively do business in Texas (Sirven 12, corrections sheet at 2).

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[8] The record is unclear as to whether these purchases were in any way related to the contract with Geosource, but there is nothing even remotely suggesting this equipment was related to the alleged death of Evan Jones.

Neither Exploration nor Soudan own any interest in any of these companies, are involved in their management, or have any contractual relationships with them (Sirven 11). One of the nine directors of Exploration, Mr. Gourgouillon, is also a director of Total Energy Resources and Total Minatome. There are no other common directors between any of Total CFP's eleven American subsidiaries and Exploration and Soudan (Sirven 58).

Exploration and Soudan are separate corporations (Sirven 22). Mr. Vaillaud, the president of Exploration, is a member of Total CFP's executive committee (Sirven 14). He is also a member of the board of directors of both Exploration and Soudan (Sirven 15). Mr. Vaillaud is the only common director or officer shared by Exploration and Soudan (Sirven 16).

Total CFP is not and has never been involved in the day-to-day affairs of either Exploration or Soudan (Sirven 13, 57-58). There is no uniform policy of operation between Total CFP's subsidiaries (Sirven 18). Each subsidiary prepares its own budget and financial statements, maintains its own financial records, pays its own bills, controls its own employees, and is responsible for its own taxes and accounts payable (Sirven 32-34, 57-58). Respondents are French corporations; under French law a parent corporation is not liable for debts incurred by its subsidiaries (Sirven 4, 22-24; corrections sheet at 1).

REASONS WHY THE WRIT SHOULD NOT ISSUE

The writ should not issue for a multitude of reasons. In the first place, the petition is unintelligible and does

not conform to the requirements of Supreme Court Rule 14.[9] Indeed, the petition itself is so incoherent that deciphering the basis of petitioner's complaint is nearly impossible. More importantly, however, petitioner has not set forth any "special or important reasons" for granting the writ. Sup. Ct. R. 10.1. Petitioner, for example, does not point to any conflict between the Fifth Circuit's decision in this case and that of another United States court of appeals or any state court of last resort. *Id.* 10.1(a). Finally, as explained immediately below, both the district court and Fifth Circuit correctly applied settled principles and properly concluded that respondents did not have sufficient contacts with the State of Texas to justify the assertion of personal jurisdiction.

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[9] Petitioner has failed even to list the parties to this proceeding. Furthermore, the caption to the petition does not supply this information since "Petty-Ray Geophysical Geosource," listed as a respondent on the cover of the petition, was not a party in the Fifth Circuit. Indeed, Exploration, Soudan, and Total CFP are not sure which, if any of them, are actually before this Court as respondents. All of these entities, however, are listed as "respondents" in this brief merely to ensure that they are heard in the event each or any of them is deemed to be properly before this Court. Additionally, petitioner has failed to identify the basis for federal jurisdiction in the lower courts; failed to supply the citation to the opinion in the court below; failed to state – much less set forth – the constitutional provision at issue in the case; failed to include all required material in the appendix; and, in general, failed to present "with accuracy, brevity, and clearness" that which is necessary to decide the questions presented. For these reasons alone, the petition should be denied. Sup. Ct. R. 14.5.

BRIEF OF THE ARGUMENT

The Due Process Clause protects a nonresident defendant's "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). It thus protects a nonresident defendant from the "burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). In a series of cases beginning with *International Shoe*, and culminating most recently in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), this Court has defined the limits of state court jurisdiction over nonresidents. Reduced to their essentials, the Court's decisions require that a nonresident defendant "have certain minimum contacts with the forum State such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316.

Such contacts exist only when the defendant does something purposeful to avail himself of the privilege of conducting activities in the forum, "thus invoking the benefit and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, [citations omitted] or of the 'unilateral activity of another party or a third person.' " *Burger King*, 471 U.S. at 475. Jurisdiction is proper only when "the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection'

with the forum State." *Id.* (original emphasis). Those activities, whether they consist of direct acts within or conduct outside the forum, must justify the conclusion that the defendant should reasonably anticipate being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297 (1980). "By requiring that individuals have 'fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign,' [citation omitted], the Due Process Clause 'gives a degree of predictability that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " *Burger King*, 471 U.S. at 472.

These principles are particularly important in cases such as this. As the Court has recognized, " 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' " *Asahi Metal Industry*, 480 U.S. at 115. The "unique burdens" placed upon one who must defend himself in a foreign legal system thus have significant weight in assessing "the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 114.

1. Due Process Does Not Permit The Contacts of Total CFP's American Subsidiaries to be Imputed to Respondents.

Petitioner's principal argument is that respondents and all other subsidiaries of Total CFP should be treated as one for jurisdictional purposes since, she claims, they were either agents of their parent or each other or mere

"conduits" for their parent's business.[10] In this case, however, petitioner must go one step beyond simply imputing the contacts of a subsidiary to a parent corporation; here, she must first impute the contacts of Total CFP's American subsidiaries to Total CFP, and then impute those contacts to Exploration and Soudan, notwithstanding that the activities of these American subsidiaries are entirely unrelated to the claims she asserts. The argument fails, both factually and legally.

In deciding whether a nonresident has sufficient minimum contacts to warrant the assertion of jurisdiction over his person, "Each defendant's contacts with the forum State must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 790 (1984); *see also Rush v. Savchuck*, 444 U.S. 320, 332 (1980). Thus, "a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there; the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent." *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159-61 (5th Cir. 1983) (citing *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925)). Instead, to obtain jurisdiction over a foreign corporation based upon the contacts of a subsidiary or sister corporation with the forum, a plaintiff must prove "control by the parent over the internal business operations and

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[10] The Fifth Circuit did not reach this issue, finding that respondents' contacts with Texas, even when considered en masse, could "not withstand constitutional scrutiny." 954 F.2d at 1069-70 n.12. Insofar as respondents can determine, petitioner does not challenge this holding.

affairs of the subsidiary in order to fuse the two for jurisdictional purposes." *Id.* at 1160. Proof of this sort of control requires more than proof of ownership of all of the subsidiary's stock; commonality of officers and directors is likewise insufficient. *Id.* Rather, the plaintiff must prove that the subsidiary is merely the alter-ego of the parent. *Id.* at 1160-61.

Here, the evidence establishes that Total CFP and its subsidiaries are separate, autonomous entities. They maintain their own corporate identities, have separate management, are financed independently, and maintain separate financial records. Petitioner has made no showing that Total CFP interferes, in any way, with the internal management of any of its subsidiaries. At most she has shown Mr. Vaillaud to be president of Exploration and a member of Total CFP's executive committee. Similarly, petitioner argues that "Total" has interlocking directorates but the record shows Mr. Vaillaud is the only common director or officer shared by respondents.

Furthermore, Total CFP's subsidiaries did not hold themselves out as "Total CFP" or "the Total Group" as petitioner claims (Pet. at 7-9). On the contrary, Exploration's agreement with the Republic of Sudan was in its own name (Dkt. No. 118, Exh. E), as was its contract with Geosource (Jones Exh. 16). Similarly, both Exploration and Soudan contracted in their own names in the assignment from Exploration to Soudan (Pommier Exh. 5), and Soudan contracted in its name in the "farm-out" agreement with Marathon (Castellani Exh. 5). Finally, both Exploration and Soudan acted in and used their own

names in their dealings with Geosource and other companies (Margherita Exhs. 1-2, 4-6 & 8; Pommier Exhs. 1-18; Castellani Exhs. 6-15).

There is no evidence in the record that either Exploration, Soudan, any other subsidiary of Total CFP, or Total CFP itself has disregarded corporate formalities, such that any of Total CFP's subsidiaries might be treated as its "alter-ego"; that either Exploration or Soudan acted "in an agency relation" for Total CFP or each other; or that any of Total CFP's subsidiaries "act as conduits for one another" (Pet. at 8). Had the lower courts accepted petitioner's argument, and disregarded Fifth Circuit precedent construing this Court's decision in *Cannon*, respondents would have been denied "fair warning" that the unrelated activities of separate corporate entities would subject them to the jurisdiction of a Texas court.

2. Exploration's Contract with Geosource is not a Sufficient Minimum Contact to Satisfy Due Process.

Petitioner's secondary argument is that Exploration – and, apparently, Soudan and Total CFP as well – are subject to jurisdiction in Texas simply because Exploration contracted with Geosource, an entity which happened to be headquartered in Houston. Petitioner's cause of action for the alleged death of Evan Jones sounds in tort, however, and does not arise out of the performance or breach of this contract. Thus, the relationship between this tort suit and this "contractual contact" is more tenuous than if the suit had arisen from a "tort contact."

Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. 1981).

Petitioner, moreover, has failed to establish that the Exploration/Geosource contract is itself a sufficient relationship between Exploration and Texas to subject Exploration to the jurisdiction of a Texas court. As this Court has recognized, a nonresident defendant's contract with a resident of the forum cannot alone establish sufficient minimum contacts to support jurisdiction. *Burger King*, 471 U.S. at 478. Instead, this Court has

> emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction". [citation omitted]. It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Id. at 479.

In this case, the "contemplated future consequences" of the agreement consisted of nothing more than the parties' performance of their agreement in the Sudan and Europe, not Texas; the "prior business negotiations" tied to this "future consequence" of performance took place in Europe, not Texas; and the contract that "tied" prior negotiations to the future consequence of performance was formed in Europe, not Texas. There is simply no

evidence that Exploration even anticipated, much less contemplated, any future consequence occurring in Texas as a result of its contract with Geosource.

Indeed, the terms of the parties' contract are inconsistent with any intention by Exploration to avail itself of the benefits and protection of Texas law. The parties, for example, did not provide that Texas law would govern the construction of the contract, nor did they select Texas as a forum in which disputes arising under the contract would be resolved.[11] Instead, Exploration and Geosource agreed that English law would govern the validity, interpretation, and performance of the contract, and also agreed to arbitrate any dispute between them in London.[12]

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[11] State and federal courts alike have recognized that the place of contracting and the law governing the contract, while not determinative, are clearly relevant to the issue of whether the contracting parties, including the defendant, have availed themselves of the benefits and protection of the law of the forum. *E.g.*, *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir. 1980) (per curiam); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 495 (5th Cir. 1974); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 763 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

[12] Both the forum selection and arbitration clauses of the contract are valid and enforceable. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). As such, petitioner's suggestion that Exploration could have brought suit against Geosource in Houston for breach of the contract is not only irrelevant, it is wrong (Pet. at 5-6).

Petitioner, however, argues that Exploration has sufficient contacts with Texas because Geosource was required to purchase materials and equipment in Texas in order to perform its contract with Exploration. (Pet. at 12-13). This argument must fail, both factually and legally.

In the first place, it is not supported by the record. While the contract required Geosource to provide certain equipment, its place of purchase was not specified (Jones Exh. 16). The contract did not mention Texas as a source of equipment or personnel. Instead, Annex B to the contract included a "Mobilization/Demobilization" section which referenced "USA," not Texas, as the tentative origin of various supplies; Europe, Malta, and Pakistan were the only other places mentioned (Jones Exh. 16). Moreover, Geosource understood "origin," to mean the place of manufacture, not purchase (Beck 70, 97).

Geosource's standard procedure was to purchase all equipment in Europe through its U.K. purchasing department (Jones 45-47). Geosource purchased the automotive equipment, for example, in Marseille (Beck 72). Mr. Welborn of Geosource was unaware of any equipment purchased in Texas for this project (Welborn 14-17). Furthermore, Geosource made no arrangements in Houston to hire employees (Beck 74), no Texas resident had any thing to do with Geosource's performance of the agreement in Sudan (Jones 43), and only one citizen of the United States worked on the project (Beck 74).

More importantly, these "contacts," even if they could have been proven, would not relate to petitioner's cause of action as there is no claim that the equipment or

materials allegedly purchased by Geosource in Texas were in any way connected with Jones' alleged death. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 404 (1984), the Court rejected a similar argument, holding "that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.* at 418. Surely, if such activity by a nonresident defendant is an insufficient contact for the purposes of due process, the same activity on the part of a resident of the forum, undertaken unilaterally, is likewise insufficient.

Exploration neither knew nor cared whether Geosource would be purchasing equipment or hiring Texas residents in Texas or elsewhere since these were matters left to Geosource's sole discretion (Castellani 38-41, 51; Jones Exh. 16). Petitioner has made no showing that Exploration had any control whatsoever over Geosource's alleged decision to hire employees and purchase equipment and materials in Texas or elsewhere. When, as here, one contracting party has absolute control over the manner and place of his own contractual performance, that party's decision to undertake activities in the forum is unilateral conduct; it is not sufficient to establish that the other, nonresident party has invoked the benefits and protection of the forum state's laws. *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 603 (7th Cir.1979), *cert. denied*, 445 U.S. 907 (1980).

In the final analysis, petitioner has shown only that Exploration may have known that it was contracting with the British office of a Texas company. Such knowledge,

however, whether actual or constructive, is no evidence that Exploration purposefully availed itself of the benefits and protection of Texas law. *Cf. World-Wide Volkswagen*, 444 U.S. at 297-98 (mere foreseeability that nonresident's product may find its way to forum is insufficient contact).[13]

3. Texas has no Special Interest in Exercising Jurisdiction Over Respondents and the Assertion of Jurisdiction Would be Unreasonable.

In assessing whether a nonresident's contacts with the forum are sufficient to satisfy traditional notions of fair play and substantial justice, it is also appropriate to consider the interest of the forum state in adjudicating the controversy. *Asahi Metal*, 480 U.S. at 113; *World-Wide Volkswagen*, 444 U.S. at 292. This is particularly true when, as here, the plaintiff's cause of action is for the alleged wrongful death of a foreign national occurring in a foreign nation. Here, as in *Asahi Metal*, the Court "must

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[13] Petitioner also suggests that Soudan's farm-out agreement with Marathon is itself a sufficient minimum contact to establish jurisdiction over all three respondents (Pet. at 14). The relationship between this contractual "contact" and her cause of action, however, is even more tenuous than Exploration's contractual "contact" with Geosource. As is the case with the Exploration/Geosource contract, the farm-out agreement was negotiated, executed, and performed abroad. Moreover, the brief presence of two unidentified "Total" representatives in Houston prior to meaningful negotiations leading to the formation of the farm-out agreement is not a sufficient contact with Texas for the purposes of petitioner's suit against respondents, which does not arise out of or relate to this "contact." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. at 418.

consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the [Texas] court." 480 U.S. at 115 (original emphasis). In this case, for example, it is far from certain Texas law should govern the question of whether three French corporations should be held liable for the alleged death of a subject of the United Kingdom in the Republic of Sudan, and if so, to what extent. Although petitioner claims to be a Texas citizen, on the facts of this case, "Texas has no 'special' interest in granting relief to its citizens against a foreign corporation on a cause of action that arose under the laws of a foreign government for conduct outside the United States." *Reich v. Signal Oil & Gas Co.*, 409 F. Supp. 846, 851 (S.D. Tex. 1974), *aff'd mem.*, 530 F.2d 974 (5th Cir. 1976).

CONCLUSION

Respondents' "contacts" with Texas, such as they are, cannot be considered anything but "random," "fortuitous," and "attenuated." The mere fact that one of them contracted with a Texas based corporation is not enough to subject any of them to the jurisdiction of a Texas court or a federal district court sitting in Texas. The State of Texas, moreover, can claim no legitimate interest in providing a forum for an action arising out of a tort allegedly committed against a British citizen by a French corporation in Sudan. To hold otherwise would stand the notion of minimum contacts on its head.

PRAYER

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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